CHONG NGAM SEN v. YEOH BAH CHEE

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Abdul Hamid F.JJ.) November 17 & December 5, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1980]

Practice and Procedure — Application for summary judgment — Question of law raised but not determined — Leave to defend should be given — R.S.C. 1957, O. 14 & O. 25.

The respondent had brought an action for possession of premises let to the respondent. The respondent relied on an implied term for renewal of the tenancy. The learned judge without deciding this matter gave summary judgment for the respondent. The appellant appealed.

Held: as there was a question of law raised and not determined, leave to defend should be given.

FEDERAL COURT.

K. Thayalan for the appellant.

Chan Siew Yoon for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The appellant is a tenant of a part of a well-known building in Kuala Lumpur known as the Chinwoo Stadium, which he uses for a restaurant. He holds the premises upon terms stated in two letters dated September 6, 1973 and November 9, 1973 from the Official Assignee. He has in fact been a tenant since January 27, 1965 under agreements made with the owner of the building, the Selangor Chinese (Chinwoo) Athletic Association for definite terms, renewed from time to time. In 1973, Chinwoo was deregistered and the affairs of the Association passed into the hands of the Official Assignee. Thus when the question of the renewal of the appellant's lease came up in 1973, it was dealt with by the Official Assignee.

The relevant term contained in the Official Assignee's letter is the one granting a further lease for 5 years from January 1, 1974 at a monthly rental of $2,500 "subject to further consideration for renewal at the expiry of the present five-year period either by the Official Assignee if the plaintiff Association's Administration in winding-up is still in his hands or by the new management of the Association provided its registration is approved by the Registrar of Societies, Malaysia."

The term expired on December 31, 1978. By this time, the Chinwoo Association had been re-registered and resumed control of its affairs. It rejected the applications of the tenant for a renewal of the term and when the tenant purported to hold over, it commenced an action for possession and payment of double-rent, mesne profits and costs.

The tenant delivered his defence and made a counterclaim. We need concern ourselves only with the defence. It relied on an implied term for renewal of the tenancy.

The defence notwithstanding, Chinwoo applied to sign final judgment and from paragraph 11 of the affidavit in support, it was clear that the application was made under Order 14. It did not ask for the dismissal of the counterclaim.

The learned judge held at the end of the argument in chambers that there was no defence, he gave leave to Chinwoo to enter judgment as prayed and he also dismissed the counterclaim.

It is clear that whether there was an implied term or not for the renewal of the lease depends on the proper construction to be given to the phrase "subject to further consideration for renewal of the lease." This is a question of law. If the court had proceeded to determine this point of law under Order 25 Rules of the High Court 1957, it might perhaps have been able to come to a concluded judgment on the ground that this determination disposes of the entire issue between the parties. But it could not because the matter was not put before him in this light and it did not. The argument of counsel for Chinwoo proceeded on the assumption that there was no such term.

Where therefore there is a question of law raised and remained to be determined, leave to defend should be given.

We therefore allow the appeal with costs, set aside the leave to sign final judgment and the order to strike out the counterclaim and order the case to be set down for trial.

Appeal allowed.

Solicitors: *Skrine & Co.; T.C. Chong & Ismail Yassin.*